No. 87-2048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TEXACO INC.,

Petitioner,

—*vs.*—

RICKY HASBROUCK, d/b/a RICK'S TEXACO, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER TEXACO INC.

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REPLY BRIEF FOR PETITIONER

A. The Basis Upon Which The Decision Below Rested Is Not Defensible

1. Neither Respondents nor their *amici* attempt to defend the rule of law adopted below. Indeed, there is scant mention of the opinions and basis for decision of the Court of Appeals and District Court.[1] It is this Court's practice to "decide the case as it was framed by the Court of Appeals." *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. ____, ____ n.2, 108 S. Ct. 1931, 1936 n.2 (1988). Respondents and their *amici* cannot and do not claim it to be sensible, or even possible, for suppliers to calibrate their prices to each wholesaler's costs of operation so as to preclude every wholesaler from having the capability of reducing its resale prices to a retail customer that

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1 As is clear from the opinion of the Court of Appeals (PA), as well as that of the District Court (PB), Texaco preserved the issues raised by the Petition and the courts below were abundantly aware of Texaco's position on those issues.

might compete with a retailer buying directly from the supplier. For the reasons discussed in Petitioner's Brief ("P. Br."), the Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner ("U.S. & FTC Br."), and the briefs of the other *amici* supporting Petitioner, there can be no such rule.[2]

2. If there is to be wholesaling, wholesalers *must* pay less than retailers, the difference *must* cover more than wholesaler costs (or no one will become or remain a wholesaler), and absent an illegal resale price maintenance agreement, wholesalers always have the capacity to pass along some or all of their lower price to one or more of their customers whenever they see fit to do so. The assumption below that suppliers could prevent this by tailoring each wholesaler's price to that wholesaler's costs, respectfully, was indisputably erroneous.

B. The Lower Courts Recognized That The Judgment Could Not Be Sustained Unless It Was Unlawful To Sell To A Wholesaler For Less Than Retailers. Respondents' Attempt To Suggest That It Was Unnecessary To Address The Issue is Disingenuous

1. Unable to defend the decision below on its own rationale, Respondents regrettably devote much of their brief to obfuscation of the facts in order to support their suggestion that it might have been unnecessary for the courts below to reach the wholesaling issue given Dompier and Gull's retail operations. Ultimately, however, Respondents are constrained to concede that the damages sought and recovered for the pre-July 1974 period were based upon Dompier's purchases and sales as a *wholesaler* and not any purported retailing.[3] Plaintiffs chose

2 Indeed, a supplier that attempted to implement it could be sued by the FTC and wholesalers. P. Br. 24 n.41; U.S. & FTC Br. 18-19.

3 Brief of Respondents ("R. Br.") 19 ("The damage calculations for pre-1974 were based on the discount Dompier gave its customers. . . ."); 48 ("when Dompier was selling gasoline to competing retail stations. . . . the damage analysis was based only on the difference between the plaintiffs' price and the price paid by the stations Dompier supplied.")

not to present evidence that would permit anyone to separately determine damages for the pre- and post-1974 periods. JA 315, 353-54.[4] Thus, as the courts below recognized, if it was lawful for Texaco to sell to wholesaler Dompier at the wholesaler price when Dompier was merely reselling as a wholesaler to independent retailers, the judgment could not be sustained.[5] The issue could not be disregarded. The courts below concluded that Texaco illegally discriminated in price by selling to a Texaco-brand wholesaler at the same wholesaler discount given all other Texaco-brand wholesalers in Washington and Oregon,[6] because the wholesaler, at times, independently (JA 369) chose to pass along some of the wholesaler discount to some of its independent retailers who, in turn, independently decided to pass along some portion to consumers.[7] Plainly the issue exists.

4 *See also* Transcript of Hearing on Judgment NOV Motion, Docket No. 758, at 36-37 (August 14, 1985).

5 The District Court repeatedly cautioned plaintiffs on this score. *See* P. Br. 12 n.16.

6 Respondents' Brief refers to an exhibit not introduced into evidence to suggest that different Texaco-brand distributors paid different prices in the Spokane District in 1974. R. Br. 13. The document discloses that while prices varied with the retail tankwagon price, the wholesaler discount of 3.65 cents from the retail tankwagon price prevailing in each area was identical for all Texaco-brand distributors in Washington and Oregon. Plaintiffs previously elicited this fact by deposition, and it was read into the record. R. 2346-47. In addition, plaintiffs introduced evidence showing the basically nationwide nature of Texaco's wholesaler discount at the time. R. Br. 10-11 (quoting from JA 410-13); *see also* JA 419-20. Far from the present attempt to imply something unique about Dompier's wholesaler discount, Respondents' counsel complained in summation that the problem was Texaco's desire to give its wholesalers uniform treatment: "Really what happened is Texaco set its price based upon a pricing system and it didn't consider the individual competitive situations in the market." R. 3227.

7 Nothing about Texaco's uniform wholesaler price compelled Dompier to one day raise its prices to some customers and cut prices to others, and to do something different another day. Throughout, Dompier "sold gasoline to different dealers at different prices on or about the same day." R. 946. For long stretches of time, Dompier's prices to its

2. Whether Texaco should be liable for price discrimination damages for charging wholesaler Dompier the wholesaler price when Dompier was functioning as a wholesaler—the crux of this appeal—has nothing to do with Gull and Red Carpet. Plaintiffs attempted to weave these entities in and out of their case below to generate prejudice and confusion with the jury, the lower courts and temporarily, even the Solicitor General's office.[8] It is regrettable that they have seen fit to continue this approach before this Court.

a. Red Carpet Service, Inc.

Red Carpet Service, Inc., a corporation owned by the then owner of Dompier, had two car wash-service station facilities which purchased gasoline from Dompier. JA 119-20, JA 180-81; R. 1863. Plaintiffs explicitly disclaimed seeking compensable damages as to the Red Carpet stations. R. 1863-66.[9] Texaco's motion to strike the testimony as to Red Carpet was denied, with the District Court explaining that because "it is not included in the plaintiffs' damage claim" he thought it might be as "useful" to defendant. R. 1882. In all events, since damages were not being claimed as to Red Carpet, Red Carpet's status as a separate corporation was not further litigated. The issue of the relationship between the Dompier and Red Carpet corporations was not presented to the jury at plaintiffs' specific request. R. 3133. It is more than inappropriate for Respondents to attempt to now interject Red Carpet into this case.

Apart from the Red Carpet corporation car washes, Respondents have no basis whatever for their assertions that "Dompier

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retailers were the same or higher than Texaco's prices. P. Br. 9. To require suppliers to set prices to wholesalers and retailers based on the supplier's knowledge of what a single wholesaler is passing on to some retailer and what the latter is passing on to the public at the time, would be to prescribe pointless chaos.

8 *See* Petitioner's Response to Brief for the United States As *Amicus Curiae* 6-8.

9 These facilities charged gasoline prices higher than those charged at the average major-brand full-service station. R. 1143-44.

sold at retail throughout the damages period." R. Br. 23. Plaintiffs themselves advised the jury that Dompier did not acquire its first retailer until 30 months into the damage period and acquired a few others only over several years. JA 357-58. Plaintiffs also necessarily drew no distinction between independent retailers and employee-operated stations in addressing other elements of Robinson-Patman liability, such as competition between favored and non-favored customers and competitive impact. B-6 n.6.

Thus, with respect to competitive impact, although it was an admitted fact that Dompier's prices were set solely by Dompier (JA 369), plaintiffs' counsel advised the jury:

> "This case could have been brought if Mr. Dompier had never salary operated a station, but it only supplied stations the whole time if he was passing the discount to them. . . . If the favored price is passed through the purchaser like Mr. Dompier to his customer, that's price discrimination." JA 361-62.

The District Court also instructed the jury that the basis of plaintiffs' claim is that lower prices to Dompier "were passed through to Dompier Oil Company's customers." Jury Instruction No. 16, JA 388. It repeatedly expressed its concern regarding the fact that Dompier had "no salary operated stations prior to '74" (JA 315),[10] and that plaintiffs had chosen not to differentiate between the period when Dompier was only a wholesaler and when it was both a wholesaler and a retailer, observing, "they are not broken out, I might say." JA 315.

b. Gull Oil Company

Gull Oil Company ("Gull"), as explained in Petitioner's Brief 5-6 and n.5, never marketed Texaco-brand gasoline either as a wholesaler or a retailer. Plaintiffs' damage theory, as exemplified by the very first paragraph of Respondents' Brief,

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10 *See also* Transcript of Hearing on Judgment NOV Motion, Docket No. 758, at 38-39 (August 14, 1985): "I have some difficulty with where the discrimination was pre-'74 prior to the time Dompier got in the retail business, and I take it that you strictly rely upon *Perkins*."

was the impact upon them of lower-priced *Texaco brand* stations on their *Texaco brand* stations. Hasbrouck, for example, testified he never noticed his customers at Gull stations. JA 256. Nor, as Respondents' Brief acknowledges, did plaintiffs complain to Texaco about the prices at Gull stations. R. Br. 17 n.14. No Gull station was claimed to have caused compensable damages to any plaintiff. In acknowledging that the "damage calculations for [the] pre-1974 [period] were based on the discount Dompier gave its customers" (R. Br. 19), Respondents confirm the irrelevance of Gull to the issue of liability for those damages.

3. Finally, Respondents' contention that Petitioner, by supposedly not seeking a jury instruction with respect thereto, waived its position that it is not liable for selling to wholesalers at lower prices than retailers (R. Br. 29-30), is frivolous. The District Court took pains to make it emphatically clear that instructions had been sought and rejected and that the issue was fully preserved. R. 3156-58. And, of course, if there were no wholesaler issue in the case, there would be no point to Instructions 18 and 23(A). JA 392-93, 399.

C. Certainly For The Period Damages Were Based Upon Dompier's Purchases And Sales As A Wholesaler, There Was Nothing "Nominal" Or "Illegitimate" About Its Functioning As A Wholesaler: It Had No Other Business

Prior to July 1974, Dompier operated only as a wholesaler, performing the wholesaler's role of selling to retailers. No basis exists for pretending otherwise. Indeed, as described in Petitioner's Brief 7-8, throughout the period of suit and until becoming a Conoco wholesaler, Dompier's functions included: persuading accounts to purchase gasoline and other products from it; handling billing; extending credit; carrying accounts receivable; maintaining trucks, a warehouse and bulk storage facilities; evaluating the purchase and lease of properties for service stations; employing sales and office personnel and facilities; and providing sales promotions and related services to its customers. R. 929-35, 942-44. As plaintiffs conceded, Dompier's pricing decisions were entirely its own. JA 369; R. 895, 946.

D. In All Events, The Jury Was Instructed It Could Find Price Discrimination Notwithstanding Dompier's Being A Wholesaler

Petitioner agrees (P. Br. 22 n.38) that merely labeling an entity a "wholesaler" does not make it one. The issue here, however, is not one of labeling. Liability was imposed notwithstanding acceptance of the fact that Dompier was a wholesaler. Thus, the jury was instructed that even if it concluded Dompier was nothing but a wholesaler, it should still treat it as a competitor of plaintiff retailers if Dompier had retail "customers" that so competed. Jury Instruction No. 23(A), JA 399. The jury was also instructed that "[w]here a seller such as Texaco extends a lower price to a buyer who resells at wholesale, there may be a price discrimination" if the seller knows the wholesaler is going to pass on some portion of its lower price to service station customers. Jury Instruction No. 18, JA 392-93. Although Instruction 18 called for the jury to find "that the disfavored buyer was harmed competitively by reason of the fact that a portion of the difference was passed on" (*id.*), the jury was not asked to find that Texaco had any reason to believe such might be the consequence.

E. The Significance Of Supplier Awareness That A Wholesaler Will Price Below The Supplier's Retailer Price

1. Whether because of the overriding breadth of Jury Instruction No. 23(A) or otherwise, the Court of Appeals did not adopt the supplier awareness element of Jury Instruction No. 18 as its basis for decision.[11] Respondents, however, recog-

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11 The District Court advised the jury that Instruction No. 18 was directed to the determination of the necessary effect on competition. JA 392. Under Instruction No. 23(A) and the *Morton Salt* Instruction No. 20 (JA 394-96), the jury was permitted to simply "infer" such an effect and by-pass Instruction No. 18. The Court of Appeals chose to emphasize the applicability of the *Morton Salt* inference and disregard Instruction No. 18 (PA 11), as of course the jury also might have done.

nizing the blatant unfairness of holding suppliers liable for the consequences of independent pricing decisions of independent wholesalers they are prohibited from controlling, urge the awareness element of Instruction No. 18 as the solution. R. Br. 39-40.

2. Assuming the jury, unlike the Court of Appeals, chose to weigh the awareness element of Instruction No. 18,[12] awareness still solves nothing. The issue remains: What is a supplier supposed to do when it learns a wholesaler's price to some retailers is lower than its own retailer price? The source is likely to be a complaint from a direct-buying retailer about the low prices at a retailer buying from the wholesaler. The choices would appear to be these: (a) terminate the wholesaler (assuming it can be done lawfully, *see* Petroleum Marketing Practices Act, 15 U.S.C. § 2802 (1982)); (b) somehow cause the wholesaler to terminate its price-cutting retailer; (c) somehow get the wholesaler or its price-cutting retailer to agree to refrain from pricing low in the future; (d) discipline the wholesaler by singling it out for a price increase; (e) somehow get the wholesaler to discipline its price-cutting retailer by increasing its price to that retailer; (f) assuming it would not violate below-cost, primary-line discrimination and Sherman Act strictures, refrain from independently determining what prices to charge its direct-supplied retailers and adopt those of the wholesaler (assuming the unlikely prospect of feasibility);[13] and (g) promptly terminate the complaining retailer to protect against a future successful Robinson-Patman suit that would result from the failure to effectively do (a)-(f), should Instruction No. 18 be good law.

12 Instruction No. 18 does not require that the supplier have any idea about the size, duration or consequences of the wholesaler's pass-on. JA 392-93.

13 Feasibility would entail, *inter alia*, immediate accurate information about the wholesaler's pricing decisions. There is no good reason why a wholesaler would make such information available. If it did, and like Dompier regularly charged different prices to different customers, the legal and practical problems of matching would be enormous. If more than one wholesaler were involved, the problems would be impossible. As the District court observed:

> "Dompier changes its prices daily and does Texaco run around and find out what Dompier is charging and sets its price by what Dompier is charging?" R. 2135.

3. The alternatives that are the least onerous economically entail one or another form of illegal price-fixing. There is no escaping the incentive to such anticompetitive behavior that would be engendered by the imposition of new Robinson-Patman liability based on attributing to suppliers the consequences of the independent pricing decisions of their independent wholesalers if the supplier is aware of passing-on by the wholesaler.

F. Federal Courts Must Not Become Arenas For Assessing What Should Have Been The "Appropriate" Price Differential Between A Supplier's Wholesalers And Retailers

1. The Order affirmed in pertinent part by this Court in *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), prohibited different prices among wholesalers and among retailers, but allowed different pricing between the two levels of trade so long as retailers were not charged less than wholesalers. (P. Br. 17 n.24). Implicit in the form of the Order was a recognition of the impracticability and inadvisability of attempting to set, before or after the fact, what should be the "appropriate" differential between them. Since *Morton Salt* and before, the determination has been left to the day-to-day judgment and negotiations of the businesses involved and the marketplace.

2. In seeking to impose Robinson-Patman liability upon a supplier that complied with the *Morton Salt* Order—not discriminating among its wholesalers or among its retailers and not charging retailers less than wholesalers—Respondents would have federal juries and courts, under the guise of the Robinson-Patman Act, assess the "spread" and on some unknowable, after-the-fact basis, pronounce it lawful or unlawful and, if the latter, impose potentially massive liabilities.

During the time in question, the wholesaler-retailer differential moved from 3.95 cents to 2.65 cents. Assuming Respondents are correct that a very wise, informed and effective businessman might have been able to assess the changing envi-

ronment sooner, have formulated new plans more promptly and have implemented them with greater expedition, these are not, and must not be made, the tests of legality under the Robinson-Patman Act.

G. Existence Of A Wholesaler-Retailer Differential, As Recognized By The *Morton Salt* Order, Is A Necessary Fact Of Commercial Life That Was Not Outlawed By The Robinson-Patman Act

1. Neither Respondents nor their *amici* dispute that it is essential to wholesaling that the wholesaler pay less than retailers. Nor do they dispute that at the time of the Robinson-Patman Act, the practice of selling to wholesalers at lower prices than retailers was wide-spread, age-old, lawful and not the subject of complaint to Congress. It is also indisputable that Congress was aware of the practice, had no ill-will towards wholesalers and no intention to disrupt on-going supplier-wholesaler relationships.

2. In this context, the notion that by dropping the proposed *addition* of a superfluous functional classification provision that reflected existing law but was opposed by some agricultural interests (not because they had anything against wholesalers having a differential but because they feared the language might adversely impact them), Congress somehow intended *sub silentio* to turn existing practice and law on its head, respectfully, is absurd. U.S. & FTC Br. 22-25. The fact that there was "absolutely no opposition to striking this paragraph from the bill"[14] underscores the absence of an intention to change anything.

3. Given the *Morton Salt* Order, the half-century of continued, unchallenged wholesaler-retailer price differentials, the "safe harbor" representations of the federal enforcement agencies (*see* P. Br. 18 and n.27) and their repudiation of the *Standard Oil*[15] approach (*see* U.S. & FTC Br. 20-22 and 1a-2a),

14 80 Cong. Rec. 8122-23 (May 27, 1936) (Statement of Rep. Boileau), *reprinted in* 4 E. Kintner, *Federal Antitrust Laws and Related Statutes* 3287 (1980).

15 *Standard Oil* v. *FTC*, 340 U.S. 460 (1962).

and the otherwise unanimous position of the federal courts (*see* U.S. & FTC Br. 14 n.9; P. Br. 19 n.28), to now overturn settled commercial practice something more is required than reliance upon what Congress did *not add* in 1936.

4. Nor are the Respondents aided by anything done or not done by Congress since 1936. The legislative materials cited by Respondents (R. Br. 31 n. 28) reveal that Congress has never questioned the lawfulness of wholesaler discounts in considering subsequently proposed amendments to the Robinson-Patman Act. The 1961 congressional hearings concerned not the legality of wholesaler discounts, but rather the wisdom of three proposed identical amendments to the Robinson-Patman Act that would have *mandated* wholesaler discounts sufficient to ensure that a wholesaler-supplied retailer was given a competitive price with that of a direct-buying retailer.[16] The 1969 and 1975 hearings did not address whether wholesaler discounts were lawful, but were concerned with recommendations for the complete overhaul or repeal of the Act.[17] Former FTC Chairman Kintner (counsel for petitioner in *Perkins* v. *Standard Oil Co.*, 395 U.S. 642 (1969) and a supporter of the Act) represented to the relevant subcommittee of the 94th Congress—

16 *Functional Discounts: Hearings on H.R. 3465, H.R. 4151, and H.R. 4529 Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 87th Cong., 1st Sess. 4-6 (August 30, 1961). The proposed amendments were criticized by the then Chairman of the FTC and the prior Chairman as being unworkable in requiring the seller to determine its wholesaler's costs and profit factors in order to calculate the appropriate differential between the price charged to wholesalers and the price charged to direct-buying retailers. (*Id.* at 10, 14-18, 21).

17 *Small Business and the Robinson-Patman Act: Hearings Before the Special Subcomm. on Small Business and the Robinson-Patman Act of the House Select Comm. on Small Business*, 91st Cong., 1st Sess. (October 7-9, 1969; February 4-6 and 26-27, 1970; March 3-4 and 11, 1970); *Recent Efforts to Amend or Repeal the Robinson-Patman Act—Parts 1 and 2: Hearings Before the Ad Hoc Subcomm. on Antitrust, the Robinson-Patman Act, and Related Matters of the House Comm. on Small Business*, 94th Cong., 1st Sess. (November 5-6, 11-12 and 19, 1975; December 10-11, 1975; January 26-27, 1976) ("1975-76 Hearings").

which later rejected all recommendations to repeal or amend the Robinson-Patman Act—that wholesale discounts were *lawful* under the Act.[18]

5. Nor is there anything in the "plain-meaning" of the Robinson-Patman Act (an oxymoron, it would seem)[19] requiring a different result. Section 2(a) speaks of "price discrimination" not "price difference." Outside the primary-line context (geographic price differences injurious to competitors of the *seller*), as this Court observed in *Anheuser-Busch*,[20] Representative Utterback (a manager of the Conference Bill which became § 2(a)), explained:

> "that 'a discrimination is *more than a mere difference*,' and exists *only* when there is 'some relationship . . . between the parties to the discrimination which *entitles them to equal treatment*.' Such a relationship would prevail among competing purchasers . . . ."[21]

Since there *must* be a wholesaler-retailer price differential and there *cannot* be "equal treatment," the differential is not "price discrimination" within the meaning of the Act. The wholesaler-retailer price differential was not viewed as "price discrimination" before the Robinson-Patman amendment, and there is no basis for viewing it as "price discrimination" afterwards. Respondents and their *amici* cannot simultaneously ask for strict construction and ignore this fact.

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18 1975-76 Hearings, Part 1, at 227 (November 11, 1975) ("It is important to note that the [A]ct does not prohibit a seller from establishing different prices at different distribution levels, for example, between wholesalers and retailers, in order to compensate buyers who perform distributional functions"). Given this explicit statement from Mr. Kintner, Respondents' attempt to read anything into his passing reference to the *Perkins* case (R. Br. at 37-38 n.36) is unavailing.

19 U.S. & FTC Br. 12 n.6 and text. By contrast, Respondents find the language of the Robinson-Patman Act "simple and straightforward." R. Br. 30.

20 FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960). *See* discussion, P. Br. 21-22.

21 *Anheuser-Busch*, *supra*, 363 U.S. at 547. (Emphasis added).

6. Where there is only a lower price to a higher level of trade (as opposed to a "discrimination"), the wholesaler's independent pricing decisions are not attributable to the supplier. P. Br. 22 n.38. But where there is a "discrimination" between purchases at the same level of trade ("which entitles them to equal treatment"), the supplier will be liable for the consequences of the favored buyer's pricing decisions *flowing from that discrimination*. *E.g.*, *Perkins* v. *Standard Oil Co.*, 395 U.S. 642 (1969); *Falls City Indus., Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983).

7. The States' *amici* brief ("States' Br.") takes a particularly extreme position. To them, wholesaler-retailer differentials, even if never passed on and never causing injury, are still unlawful if the wholesaler merely *might* sell to retailers that compete with direct-buying retailers:

> "Actual passing on of the discriminatory discount is not necessary to have the requisite effect for purposes of liability under Section 2(a). It is enough that the discrimination makes such competitive effect a reasonable possibility." States' Br. 8 n.13.

Thus, to avoid Robinson-Patman Act exposure, the States counsel two choices (States' Br. 11-12):

a. The affirmative defense of cost justification, as to which the uncertain state of the law and of "cost" accounting, projection and analysis, particularly as applicable to the key but amorphous function performed by wholesalers of persuading retailers to buy and remain good customers, would preclude any lawyer from being able to assure the client of success;[22] or

b. Simply getting rid of retailers and/or wholesalers in every market so that only one or the other will remain, thereby assuring that the various markets will be less competitive—i.e., protect retailers from the prospect of potential competition by terminating them entirely. Respectfully, the States evince no

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22 *See* United States v. Borden Co., 370 U.S. 460 (1962); ABA Antitrust Section, Monograph No. 4, *The Robinson-Patman Act: Policy and Law Volume II*, 99-120 (1983).

recognition of this Court's repeated admonition that the Robinson-Patman Act be construed consistently with broader policies of the antitrust laws. P. Br. 28 n. 47; U.S. & FTC Br. 18-22. Nor do they recognize that the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 *et seq.*, was enacted in 1978 and precluded the termination of wholesalers and retailers without cause in this industry, unless the supplier withdraws from the market entirely.

8. As the Brief of the United States and FTC demonstrates (U.S. & FTC Br. 25-28), nothing in this Court's prior decisions would lead to the conclusion that it is unlawful for suppliers to sell to wholesalers for less than retailers. The reliance of Respondents and their *amici* on this Court's opinion in *Perkins*, *supra*, is misplaced. To characterize Perkins as a retailer complaining of the lower price given to a wholesaler is to misstate the facts of *Perkins*. The briefs before this Court in *Perkins* make clear that the focus in fact was on Perkins' status as a wholesaler:

> "While Petitioner [Perkins] operated principally as a *wholesaler*, he also operated service stations. . . . Perkins *bought all of his gasoline, including the gasoline he sold at retail, at the jobber price* (*wholesale*) of 4 to 5 1/2 cents per gallon below the posted tank-truck price." Brief for Respondent In Opposition at 5, filed November 7, 1968, October Term 1968, No. 624. (Emphasis added).

Consistent with these facts, the Brief for Petitioner stated the Question Presented as follows:

> "Whether Standard's discrimination in price between competing *wholesalers*—which substantially lessened competition in the Pacific Northwest wholesale and retail gasoline markets—is immune from attack under Section 2(a) of the Clayton Act solely because the most direct and immediate competitive injury was felt at the retail level and, in reaching that level, Standard's gasoline was resold by the favored wholesaler to a majority-owned subsidiary which, in turn, resold again to its majority-owned retail outlets."

> Brief for Petitioner at 3, filed April 7, 1969, October Term 1968, No. 624. (Emphasis added).

Thus, both sides acknowledged that the price discrimination was between entities *at the same level of trade*—wholesale.

H. Inferring Injury To Competition From The Unsurprising Fact That Wholesalers Have Been Charged Less Than Retailers Is Indefensible

Respondents contend (R. Br. 45) this point was waived because there was no objection to Instruction No. 20, the *Morton Salt* inference instruction. JA 394-96. That Instruction correctly states the inference by requiring the purchasers to be "in competition with each other." The problem was created by Instruction No. 23(A), to which Petitioner objected (R. 3158-59), which defined "in competition with each other" so expansively as to include Dompier's customers, thereby destroying the logic of the inference.

I. Damages Were Sought On The Basis Of "Texaco Decreasing Plaintiffs' Purchase Price To Dompier's Purchase Price." Plaintiffs' Exhibits And Representations Did Not Distinguish The Pre- And Post-1974 Periods

Respondents assert we were mistaken in believing the plaintiff-retailers sought and obtained damages based on the claim that they ought to have received the wholesaler price for the pre-1974 period (R. Br. 48). If we were, we do not believe we were alone. Plaintiffs' Exhibits in question, P. Ex. 915 and 916, are captioned:

> "Price Discrimination Eliminated By Texaco Decreasing Plaintiffs' Purchase Price To Dompier's Purchase Price".

Similarly, plaintiffs' counsel advised the jury in summation:

> "916 and 915 go together . . . . They are another scenario, if Texaco dropped the price to the plaintiffs to Dompier's price." R. 3223.

Nor does anything in the opinions of the District Court or Court of Appeals indicate otherwise, and those opinions can be used as establishing the law. Throughout Respondents' briefs, and, indeed, the entire case, they have consistently used the words "the discrimination" to mean the wholesaler-retailer price differential. The theory of their damages was that they were entitled to eliminate "the discrimination" one of three ways: giving themselves Dompier's price; giving Dompier their price or splitting the difference. This is plainly reflected in the decisions below approving this approach.

Respondents might have obviated some of the confusion by separately presenting their pre '74 damages to the jury. They chose not to do so.[23]

J. By Receiving A Damage Award Based On Plaintiffs' Obtaining The "Favored" Price, Plaintiffs Obtained More Than They Are Entitled To By Law

"Automatic damages" were rejected in *J. Truett Payne*[24] because a disfavored purchaser has no legal right to the favored price. A seller has every right to continue selling the "disfavored" purchaser at its high price so long as it stops selling at the low price to the "favored" purchaser.

Respondents assume they can get more than they are legally entitled to if they offer 3 or 6 scenarios and combine the permissible with the impermissible.[25] Respectfully, that cannot be the law.

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23 *See* Transcript of Hearing on Judgment NOV Motion, Docket No. 758, at 36-37 (August 14, 1985).

24 *J. Truett Payne Co., Inc.* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981).

25 Thus Respondents assert:

"Unlike both *Rose Confections, Inc.* v. *Ambrosia Chocolate Co.*, 816 F.2d 381 (8th Cir. 1987) and *Olympia Co., Inc.* v. *Celotex Corp.*, 771 F.2d 888 (5th Cir. 1985), cited by Texaco, here plaintiffs' damages did not rest on only one presumed theory that plaintiffs would have received Dompier's price." R. Br. 47 n.44.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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